91-815

(1)

NO. ____-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

KENT SANDLIN,
Petitioner,

BARBARA TUSTISON,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA STATE COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION THREE

PETITION FOR WRIT OF CERTIORARI

JEFFREY WILENS, Attorney at Law
6 Hutton Centre Drive, 11th Floor
Santa Ana, California 92707
(714) 434-5667

Attorney for Petitioner
Counsel of Record

QUESTION PRESENTED

WHETHER A DEFENDANT SEEKING AN EVIDENTIARY HEARING PURSUANT TO FRANKS V. DELAWARE IS REQUIRED AS PART OF HIS "SUBSTANTIAL PRELIMINARY SHOWING" TO PRESENT INDEPENDENT CORROBORATION OF HIS OWN SWORN DECLARATION?

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KENT SANDLIN, Petitioner, BARBARA TUSTISON, Petitioner, v. PEOPLE OF THE STATE OF CALIFORNIA, Respondent.	)

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA STATE COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION THREE

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioners KENT SANDLIN and BARBARA TUSTISON, hereby respectfully pray that a writ of certiorari issue to review the

opinion of the California Court of Appeal which affirmed the trial court's holding that Petitioners were not entitled to an evidentiary hearing pursuant to Franks v. Delaware.

OPINION BELOW

The citation of the opinion of which review is sought in this court is People v. Sandlin, 230 Cal.App.3d 1310, 281 Cal.Rptr. 702 (Dist. 4 1991).

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 USC section 1257(3) on the grounds that their rights under the Fourth and Fourteenth Amendments to the United States Constitution were violated.

The California Court of Appeal entered its order rejecting Petitioners'

Fourth and Fourteenth Amendment claims on May 31, 1991, and denied Petitioners' request for a rehearing on June 24, 1991.

The California Supreme Court denied a hearing on this case on August 22, 1991 by a 4-3 vote. The instant Petition for Writ of Certiorari is filed within 90 days of that order.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. United States Constitution, Amendment IV.
>
> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . . United States Constitution, Amendment XIV, section 1.

STATEMENT OF CASE

Petitioners were arrested on June 21, 1988 by the Costa Mesa, California Police Department after the execution of a search warrant on their homes. [Clerk's Transcript on Appeal,[1] 5] They were thereafter charged by complaint with violating California[2] Health and Safety Code sections 11358, 11359 and 11366, all of which relate to the possession or cultivation of marijuana. [CT, 1, 236, 242-245]

A preliminary examination was held on March 16, 1989, in the Orange County Municipal Court, Harbor Division, before the Honorable Francis Munoz. Petitioners were held to answer. [CT, 5]

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[1]Hereinafter CT.

[2]All references to the "Health and Safety Code" or "Penal Code" are to codes of the State of California.

On May 12, 1989, Petitioners were arraigned in the Orange County Superior Court on an Information alleging the same violations. On June 1, 1989, Petitioners filed a Motion for Pre-Trial Discovery which sought material relating to the existence of the facts contained in support of the search warrant affidavit. On August 17, 1989, the Honorable Myron Brown, Superior Court Judge, granted Petitioners' request for discovery. [CT, 75]

On December 21, 1989, Petitioners filed a Motion to Dismiss pursuant to Penal Code section 995.[3] [CT, 163] On December 22, 1989, Petitioners filed a Motion to Suppress Evidence pursuant to

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[3]This section provides that an information may be set aside if the defendant had been committed thereon without reasonable cause or otherwise by illegal means.

Penal Code section 1538.5.[4] [CT, 168] Both motions came on for hearing before the Honorable Ronald E. Owen, Superior Court Judge, on January 5, 1990. The motion to dismiss was denied. [CT, 236]

With regard to the Penal Code section 1538.5 motion, Petitioners sought a hearing pursuant to Franks v. Delaware. Los Angeles County Sheriff's Deputy Joseph Nunez had submitted an affidavit in support of the request for a search warrant. In substance, Nunez averred that another police officer (whose identity Nunez concealed from the magistrate by referring to him as a confidential informant) had observed Petitioner Tustison during the week of June 13, 1988, engage in an apparent mari-

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[4]This section governs the suppression of evidence obtained in violation of the Fourth Amendment to the United States Constitution.

juana transaction in a shopping center parking lot. Nunez also averred that he had personally observed Petitioner Tustison in possession of a quantity of suspected marijuana while she was driving a pickup truck. Nunez also averred that during the week of June 17, 1988, he had personally observed Petitioner Sandlin engage in an apparent marijuana transaction in a hospital parking lot. Nunez averred that both Petitioners lived in separate units of the duplex which was ultimately searched pursuant to the warrant. [CT, 199-209]

In support of their request for a Franks hearing, Petitioners' moving papers provided the Superior Court with detailed allegations of falsehood together with statements of supporting reasons thereof. [CT, 195-198] They submitted their own declarations under

penalty of perjury which categorically denied that they had engaged in the specific activities described in the affidavit.[5]

In her declaration, Petitioner Tustison stated that she was not present in the shopping center complex during the period of time (the week of June 13, 1988) in which the informant/officer allegedly observed her sell marijuana. She also stated that did not drive the pickup truck in question with a baggie of marijuana during the period of time (sometime in June 1988) in which the affiant/officer allegedly observed her in possession of marijuana. [CT, 195-196]

In his declaration, Petitioner Sandlin stated that he was present in the hospital parking lot during the

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[5]These declarations are fully reproduced in the text of the opinion below, which is contained in Appendix A.

period of time (the week of June 17, 1988) in which the affiant/officer allegedly observed him sell marijuana; however, Sandlin indicated that he was there to visit his ill father and did not engage in the reported drug sale. [CT, 197]

Notwithstanding Petitioners' showing, the Superior Court denied Petitioners an evidentiary hearing pursuant to Franks v. Delaware on the grounds that they had failed to make a "substantial preliminary showing." [CT, 236]

On January 22, 1990, Petitioners entered a no contest plea to various marijuana-related charges and were sentenced to terms of incarcerations. Their sentences were stayed and they are free on bail pending resolution of their appeals. [CT, 241]

On May 31, 1991, the California State Court of Appeal, Fourth District, filed its decision on Petitioners' appeal. Concurring with the trial court's determination that Petitioners had not been entitled to a Franks hearing, the Court of Appeal affirmed the judgment. [See Appendix A] On June 24, 1991, the Court of Appeal denied Petitioners' request for a rehearing. [See Appendix B] On August 22, 1991, the California Supreme Court denied Petitioners' Petition for Review. [See Appendix C]

ARGUMENT FOR ISSUANCE OF THE WRIT

Certiorari should be granted in this case in order to settle an important question of law concerning the required extent of a defendant's "substantial preliminary showing" that an affidavit in support of a search warrant contains intentional, material falsehoods, to resolve a substantial conflict among the state and federal courts, and to correct the erroneous ruling of the court below.

* * *

In Franks v. Delaware, 438 U.S. 154 (1978), the Supreme Court held that under certain circumstances a defendant has a Fourth Amendment right to challenge the truthfulness of factual statements made in an affidavit supporting a search warrant. Justice Blackmun set forth the policy concerns in favor of this holding:

> The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search.
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> '[W]hen the Fourth Amendment demands a factual showing sufficient to comprise "probable cause," the obvious assumption is that there will be a **truthful** showing.' Franks, 438 U.S. at 164-65 (citation omitted).

The Court went on to hold that:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded

> to the same extent as if probable cause was lacking on the face of the affidavit. Franks, 438 U.S. at 153-54.

In speaking of this "substantial preliminary showing," the Court also referred to it as a "suitable preliminary proffer of material falsity," Franks, 438 U.S. at 169, and as a "sensible threshold showing," Id. at 170. The Court further clarified that the "substantial preliminary showing" must be:

> [M]ore than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Franks, 438 U.S. at 171.

There is **nothing** in this language which states that an affidavit or sworn statement by the defendant is, by itself, insufficient to constitute a substantial preliminary showing. Put another way, nowhere in Franks does the Court impose a requirement that a defendant must provide independent corroboration for his own factual assertions.

Although, the Court left it to the states to fashion suitable rules to govern proffers, Franks, 438 U.S. at 172, this discretion does not extend to the imposition, either explicitly or implicitly, of additional requirements not set forth in Franks. Yet, a number of State and Federal courts, including the California Court of Appeal in the instant case, have imposed just such a requirement.

In the instant case, the California Court of Appeal considered three defense bases for a Franks hearing. The first basis was that the affiant omitted the fact that the "confidential informant" was really a police officer. The Court of Appeal held that this omission did not warrant a Franks hearing because had the affiant revealed that fact, there would have been even more probable cause. Petitioners challenge this ruling.[6]

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[6]The Court of Appeal erred in treating this mischaracterization of the informant as an "omission." In knowingly misrepresenting to the magistrate that the "informant" was a "confidential informant," Nunez damaged his credibility. In doing so, he lent weight to the Petitioners' assertions. See, e.g., People v. Costello, 204 Cal.App.3d 431 (1988) ("The existence of one deliberate misstatement in an affidavit lends some weight to the idea that other misstatements may have been made with the same state of mind.").

The second basis related to a challenge to the veracity of the informant. The Court of Appeal rejected this basis because a Franks hearing is only justified with regard to challenges to the truthfulness of the affiant, not that of the informant. This ruling was also in error, because the "informant" was really a government agent.[7]

The third basis related to a challenge to the veracity of the affiant

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[7]In United States v. Pritchard, 745 F.2d 1112, 1118 (7th Cir. 1984), the court held that "while allegations that an **informant**, whose story was recited by an affiant, was lying are insufficient to require a Franks hearing, this principle does not apply when one **government agent** deliberately or recklessly misrepresents information to a second agent, who then innocently includes the misrepresentation in an affidavit. Since the "informant" in the instant case was a police officer, as was the affiant, the exception mentioned in the Pritchard case would be applicable. Therefore, Petitioners' allegations with regard to the informant's observations should be analyzed in the same manner as those observations made directly by the affiant.

with regard to his personal observations of suspected drug activity engaged in by Petitioners. The Court of Appeal considered Petitioners' declarations, but held as follows:

> The Franks requirement of a "substantial showing: means an offer of proof which must include affidavits or statements of reliable witnesses, or explanations for absence. But the only proof submitted here was the defendants' conclusory and uncorroborated[8] statements that they did not do what the affidavit alleged. These are little more than self-serving general denials and fall far short of the substantial showing re-

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[8]The Court of Appeal relied in part on United States v. Johns, 851 F.2d 1131 (9th Cir. 1988), in which the defendants bolstered their own allegations with that of two scientific experts, who averred that the factual statements in the warrant affidavit were necessarily false because they were scientifically impossible. But, while Johns does stand for the proposition that when a defendant can show that the factual statements in the affidavit are impossible, he should be entitled to a Franks hearing, it does not stand for the proposition that a defendant must prove those statements are impossible in order to gain a hearing.

quirement of Franks. People v. Sandlin, 213 Cal.App.3d 1310, 1318, 281 Cal.Rptr. 702, 708 (Dist. 4 1991)

It is important to note that the Court of Appeal could only have found Petitioners' showing to be "unsubstantial" because of the lack of corroboration. All of the other requirements for a Franks hearing--the allegation of intentional falsehood relating to a specified portion of the warrant affidavit, the offer of proof supported with affidavits or other sworn statements, the absence of probable cause if the false statements were to be excised--were met in the instant case.[9]

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[9]The Sandlin court's use of the term "conclusary," is devoid of meaning. In their preliminary showing, Petitioners denied each relevant factual assertion in the affidavit by alleging specific contradicting facts; it is difficult to imagine how much more "specific" they could have made their assertions so as to avoid the stigma of being labeled

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Although the Court of Appeal did not explicitly state that it was reading Franks to impose a requirement of corroboration, and although the court did include a disclaimer that it was not holding that in every case the declaration or testimony of a defendant alone is insufficient to meet the showing required by Franks, that effectively was its holding.

By contrast, as Justice Wallin noted in dissent:

> The 'substantial showing' required by Franks requires only an offer of proof to directly controvert the affiant's statements. That offer must include affidavits or statements of reliable witnesses, or explanations for their absence.

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[9](...continued)
"conclusary." Certainly, Petitioners' factual statements were no more "conclusary," than the affiant's factual statements. Petitioners' sworn statements should not be considered "conclusory" where they are so specific as to render them subject to prosecution for perjury. Cf., People v. Garcia, infra.

> Here the two defendants submitted declarations, signed under penalty of perjury, directly controverting the affidavit.
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> [T]he only conceivable supporting proof for Sandlin or Tustison would have been a declaration from either an alibi or other percipient witness. I do not believe this kind of proof is required to obtain a Franks hearing. Sandlin, 230 Cal.App.3d at 1319, 281 Cal.Rptr. at 708.

This juxtaposition of views in the majority and minority opinions accurately defines the issue Petitioners raise in this petition: Is an uncorroborated sworn statement of a defendant automatically insufficient to constitute a "substantial preliminary showing."

A review of state and federal court decisions clearly manifests the unsettled nature of this question. As indicated above, Franks did not expressly hold that a defendant may not make a "substantial preliminary showing" solely

based on his own affidavit or sworn statement. Therefore, some courts have interpreted Franks, correctly it is urged, to permit evidentiary hearings on just such a showing.

In People v. Garcia, 109 Ill.App.3d 142, 440 N.E.2d 269 (Ill.App. 1982) (disapproved on limited grounds, People v. Lucente, 116 Ill.2d 133, 506 N.E.2d 1269 (Ill. 1987)[10]), cert. denied, 460

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[10]Garcia is still valid law in Illinois on its interpretation of Franks on the above points. However, Garcia was disapproved by the Illinois Supreme Court in Lucente with regard to the former's additional holding that when a warrant affidavit contained any falsehoods, then the entire warrant must be quashed even if the remainder after excision of the falsehoods was sufficient to establish probable cause. It should be noted that Lucente did not address the sufficiency of a preliminary showing which was limited to the defendant's affidavit. But that court, like the Garcia court, did note with approval that the affidavits before it, were sufficiently detailed so as to subject the affiants to prosecution for perjury if they were untrue. Lucente, 506 N.E.2d at 1277-1278.

U.S. 1040 (1983), the Illinois Court of Appeal considered a trial court's denial of the defendant's request for a Franks evidentiary hearing. In that case, the defendant alleged that the police officer's affidavit contained false statements. He supported these allegations with his own affidavit, which specifically denied each allegation in the warrant affidavit. His affidavit was sufficiently detailed to subject him to prosecution for perjury.

Garcia, 440 N.E.2d at 272.

The Garcia court concluded that this constituted a "substantial preliminary showing" under Franks. The court noted that

> In the present case, we do not believe defendant's affidavit should be considered unworthy of belief merely because he has an interest in the case, anymore than the police officer's affidavit should be considered unworthy of belief because he has an interest

> in the case by being a representative of government and associated with the prosecution." Garcia, 440 NE2d at 272-273.

The court went on to say

> Accordingly, if we were to require a defendant to do more than defendant did here to make a substantial preliminary showing under Franks, we could be placing an insurmountable burden on a defendant, which would, in effect, deny him a substantial right and guarantee of the 4th Amendment." Id., 440 NE2d at 273.

In People v. Allen, 158 Ill.App.3d 602, 511 N.E.2d 824 (Ill.App. 1987), another division of the Illinois Court of Appeal, was even more explicit in its interpretation of Franks. Again, the defendant had submitted an affidavit which specifically denied various factual statements in the warrant affidavit. The State specifically argued that such a denial had to be corroborated under Franks. The Court of

Appeal flatly rejected this contention, holding that:

> A defendant may be entitled to a Franks hearing on the basis of his own affidavit, if it is sufficient. The defendant has gone as far as she can go--and certainly as far as the law requires that she go--in order to be entitled to a hearing into the truthfulness of the allegations in the complaint for the search warrant. . . .She should not be punished because she was home alone and, therefore, could not provide anyone to attest to that fact. Allen, 511 N.E.2d at 827.[11]

The Illinois State Court decision in Garcia was followed by the Washington Supreme Court in State v. Thetford, 109 Wash.2d 392, 745 P.2d 496 (Wash. 1987). In Thetford, the defendant challenged the

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[11] See also, People v. Zymantas, 147 Ill.App.3d 420, 497 N.E.2d 1248(Ill.App. 1986) where yet another division of the State Court of Appeal held that a defendant's affidavit---which in that case included an unauthenticated copy of his phone bill--were sufficient preliminary showing to require a Franks hearing. The Garcia case was cited with approval. Zymantas, 497 N.E.2d at 1256.

warrant affidavit by alleging that it contained false statements by a police agent that he had purchased narcotics from the defendant in her home. In support of her contentions, the defendant provided only her own affidavits which contained denials of the events alleged by the police agent. This was sufficient under Franks according to the Washington Supreme Court to entitled the defendant to receive an evidentiary hearing at which the police agent could be called to testify. The Washington Supreme Court expressly cited Garcia, with approval. Thetford, 745 P.2d at 502.[12]

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[12]To similar effect is State v. Olson, 11 Kan.App.2d 485, 726 P.2d 1347, 1351-1352 (Kan.App. 1986), where the court held that even a defendant's attorney's affidavit could satisfy the preliminary showing required by Franks.

It is not possible to reconcile these interpretations of Franks with that of the California Court of Appeal in the instant case.

On a number of occasions, federal courts have also considered a defendant's claim for a Franks hearing which was supported only by his own sworn statement (or that of his attorney). On some of these occasions, although the record does not always reflect the full extent of the defendant's preliminary showing, the court sustained the defendant's right to a Franks hearing.[13]

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[13]See e.g., United State v. Rios, 611 F.2d 1335, 1348 (10th Cir 1979) (court found a defendant's offer of proof that he would testify as to a hearsay statement by the warrant affiant that contradicted the warrant affidavit was sufficient to justify a Franks hearing); United States v. 1328 North Main Street, 634 F.Supp. 1069, 1073 (S.D.Ohio 1986) (doctor seeking return of property made substantial preliminary showing based solely on his own state-

(continued...)

But, even where the court ultimately rejected the defendants' claim to a Franks hearing, it was not because the defendant's allegation was considered incredible, unreliable or self-serving (and therefore to be rejected out of hand), but because of some other defi-

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[13](...continued)
ments and was entitled to Franks hearing.)

Cf., United States v. Chesher, 678 F.2d 1353, 1360-1362 (9th Cir. 1982). In that case, the defendant averred that the warrant affiant intentionally or recklessly made the false statement that he was a member of gang. The Government conceded the statement was false. The court found a substantial preliminary showing had been made that it was intentionally, or at least recklessly, made based on defendant's affidavit and based on the fact that another Bureau of Narcotic's agent had reported some years earlier that the defendant was not a member of the gang (i.e., it was reckless not to be aware of this earlier report). The general language of this decision is favorable toward the principle of giving a defendant's affidavit due consideration and weight, even if there were also a little corroboration present inferentially.

ciency in his showing. For instance, the defendant's allegation may not have precluded all possibility that the affiant's statement could still have been true;[14] or his allegation may not

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[14] See e.g, United States v. Perdomo, 800 F.2d 916, 921 (9th Cir. 1986), where the affidavit contained a statement that the interior garage door of the defendant's residence opened up into the family room. The defendant alleged that the interior garage door is not visible from the front of the residence where the affiant had made his observations. The defendant argued, therefore, that the affiant had invented this fact. The court rejected the defense argument, not because the defendant's allegation was considered incredible, unreliable or self-serving, but because the defendant's allegation did not preclude the possibility that the affiant could have reached his conclusion that the garage directly connected to the family room by examining the exterior structure of the house. The court also indicated that even if this fact in the affidavit were struck, there affidavit would still establish probable cause to search the residence.

Cf., United States v. Schauble, 647 F.2d 113, 117 (10th Cir. 1981). Another case like Perdoma, supra except the defendant supplemented his own affidavit with that

(continued...)

have proven that the false statement had been intentionally or recklessly made;[15]

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[15](...continued)
of another resident of the house. But, the result was the same as in Perdoma insofar as it was still possible that the affiant was not falsely claiming the informant made his observations from outside the house even if such observations would have been impossible. When the affiant averred in that the informant had been "at" the house, he could have been using "at" as synonymous with "inside" rather than as meaning just outside the door.

[15]See e.g., United States v. Streeter, 907 F.2d 781, 788 (8th Cir. 1990) (defendant not entitled to Franks hearing even though his sworn offer of proof was accepted by the court because he failed to make an adequate showing the falsehood was intentionally or recklessly made). In United States v. Ciampa, 793 F.2d 19, 24 (1st Cit. 1986), the affidavit contained statement that the defendant frequently travels to Florida for brief trips. This information was corroborated by other information provided to the affiant. The defendant contended that his trips to Florida were infrequent and of long duration. The court found that there was no basis for finding that the affiant's statement were false. The court did not expressly hold that a defendant's statements are inherently unreliable, but rather it explicitly relied on the
(continued...)

or the facts may have been such that there would have been probable cause to justify the search even after excising the falsehood or adding in the omissions.[16]

Thus, while these cases do not unequivocally stand for the proposition that a defendant's affidavit alone can be sufficient to justify a Franks hearing, they do at least reflect a tacit acceptance of the proposition that a defendant's affidavit, standing alone, **may** be sufficient. In any event, they certainly do not reflect any acceptance of the proposition that a defendant's

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[16](...continued)
fact that there was corroborating information for the affiant's statement.

[16]See e.g, Perdomo, 800 F.2d at, 921 (court also rejected Franks hearing because even if the challenged fact in the affidavit were struck, the affidavit would still establish probable cause to search the residence).

sworn statement is inherently unreliable or self-serving and, therefore, standing alone, can never be sufficient to justify a Franks hearing.

* * *

On the other hand, a number of state and federal courts have interpreted Franks to stand for the proposition that a defendant's own sworn statement or testimony is to be disregarded as being "self-serving" and, therefore, standing alone, is not sufficient to constitute a "substantial preliminary showing."

Most noteworthy on the state side, other than the instant case, is the decision of the Massachusetts Supreme Judicial Court in Commonwealth v. Ramos, 402 Mass. 209, 521 NE2d 1002, 1006 (Mass. 1988). There, the court held that when a defendant's affidavit "merely challenged the veracity of the

police officer's account of the events in question [t]his does not rise to the level of a substantial preliminary showing. Ramos, 521 NE2d at 1006. In support of this proposition, the Ramos court cited the portion of the Franks decision which holds, according to the Ramos court, that "allegations must be accompanied by offer of proof." Ramos, 521 NE2d at 1006. In other words, the Ramos court construed the requirement of an offer of proof to exclude such proffer by the defendant himself. This is exactly the kind of misconception of Franks that needs to be clarified.

In State v. Simmons, 10 Conn.App. 561, 524 A.2d 669 (Conn.App. 1987), the defendant managed to go one step further than the defendant did in Ramos. In Simmons, the defendant submitted affidavits by himself and by his girlfriend

which denied selling narcotics to the informant. Even this was not sufficient to warrant a Franks hearing because "[a]t best, the affidavit shows that there were conflicting versions of events" but "mere denials do not constitute a substantial preliminary showing." Simmons, 524 A.2d at 671. Again, Franks is cited for this proposition. Obviously what the court was really saying is that Franks, as it read the Supreme Court's decision, **required** corroboration by a disinterested party for the defendant's "mere denials" before a Franks hearing was merited.

Despite the Illinois cases cited above, there is even confusion concerning the sufficiency of a defendant's affidavit within that state. In People v. Chicos, 205 Ill.App.3d 928, 563

N.E.2d 893, 897 (Ill.App. 1990), the court held that the defendant's testimony that no one had come to house at the time the informant allegedly made the buy was insufficient to warrant a Franks hearing. The court strongly implied that corroboration should have been presented or its absence explained. Id. In fact, several Illinois courts have gone as far as to say that in order to make a "substantial preliminary showing" under Franks, a defendant essentially must prove that the affiant's (or the informant's) purported observations were impossible. See, e.g., People v. Tovar, 169 Ill.App.3d 986, 523 N.E.2d 1178, 1182 (Ill.App. 1988).[17]

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[17]See also, People v. Castro, 190 Ill.App.3d 227, 546 NE2d 662, 668 (Ill.App. 1989), in which the court upheld the trial court's denial of a

(continued...)

Finally, in People v. Flores, 766 P2d 114, 122 (Colo. 1988), the State Supreme Court applied a lesser standard[18] than that imposed by Franks, but still found

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[18](...continued)
Franks hearing where the defendant's proffer was supported by his affidavit and that of two relatives. This decision viewed affidavits by interested parties as being insufficient if they could only deny, rather than prove as impossible, the observations in the warrant affidavit.

To similar effect is People v. Torres, 200 Ill.App.3d 253, 558 N.E.2d 645 (Ill.App. 1990) where the defendant submitted his own affidavit, as well as that of two disinterested persons, declaring that he was not present in his residence during the time frame in which the informant purportedly purchased narcotics from him. However, a Franks hearing was properly denied because the affidavits left some time gaps during which the informant could have been in the house; hence, they failed to controvert every possibility under which the warrant affidavit could still be true. Torres, 558 N.E.2d at 652.

[18]Under Colorado State law, a defendant would be entitled to a hearing upon a showing of some good faith basis in fact to question the accuracy of the affidavit. People v. Dailey, 639 P.2d 1068, 1075 (Colo. 1986).

that affidavits by the defendant and other witnesses which denied that the defendant was seen selling drugs was not sufficient to justify an evidentiary hearing. Had this court been applying the Franks standard then, it certainly would have ruled similarly.

Most noteworthy on the federal side are a number of cases from the Seventh Circuit Court of Appeal. In United States v. McDonald, 723 F.2d 1288 (7th Cir. 1983), the affiant had averred that an informant had told him that he met with the defendant at a certain date and time. The defendant presented his own testimony that he was somewhere else during that period of time.[19] The court

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[19]There was also testimony from another person corroborating that the defendant was at this other location, but not for the entire relevant period of time. The court discounted this testimony for that reason.

found the defendant's offer of proof insufficient, and not merely because he was really impeaching the informant's statements and not the affiant's statements. The court went out of its way to hold that the defendant's statement was insufficient even if his allegation were expanded to assert that the officer had fabricated the informant's statements.

> The only testimony to support appellant's conclusory statement that no informant existed is appellant's own self-serving statement as to his whereabouts....The defendant must do more than construct a self-serving statement which refutes the warrant affidavit....[W]here the district court did not believe the appellant's self-serving statement, to support his conclusion that no informant existed, the appellant failed to make a substantial preliminary showing that [the affiant falsified the affidavit]." McDonald, 723 F.2d at 1294.

The court expressly rejected following the Illinois state court decision in People v.Garcia, supra and argued that

the Illinois decision had misinterpreted Franks. McDonald, 723 F.2d at 1294.[20]

The First Circuit also reflects a similar misperception that a defendant's sworn statement, itself, cannot be sufficient to constitute a substantial preliminary showing. In United States v. Southard, 700 F.2d 1 (1st Cir. 1983), three defendants in related cases denied making incriminatory remarks to the alleged confidential informants, whom they alleged did not exist, and whose observations were used in an affidavit in support of a wiretap order. In affirming the trial court's denial of a

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[20]McDonald was closely followed by the Seventh Circuit by United States v. Reed, 726 F.2d 339, 342 (7th Cir. 1984), United States v. Pritchard, 745 F.2d 1112, 1118 (7th Cir. 1984), and United States v. Pace, 898 F.2d 1218, 1227 (7th Cir. 1990), all of which reiterated the language about the inadequacy of any defendant's "self-serving" statements to justify a Franks hearing.

Franks hearing, the Court of Appeals held that:

> All of appellant's allegations are conclusory and unsupported by any offer of proof [i.e., corroboration]....Appellant's set up a swearing contest....Appellant's denial do not demonstrate a substantial possibility of affiant perjury. Southard, 700 F.2d at 10.

And two District Courts adopted similar attitudes in United States v. Dorfman, 542 F.Supp. 345, 366 (N.D.Ill. 1982), where the court observed that "a claim that the informant did not exist, or did not report the information attributed to him in the warrant affidavit, if unsupported by substantial corroborating evidence does not entitle a defendant to a Franks hearing, and in United States v. Weingartner, 485 F.Supp. 1167, 1182-1183 (D.N.J. 1979), where the court interpreted Franks to require "substantial and reliable proof questioning the truthfulness of the

warrant affiant's representations," which the court found to be lacking in defendant's uncorroborated affidavit.

* * *

The foregoing has provided just a glimpse of the substantial conflict in numerous state and federal jurisdictions concerning whether a defendant's sworn statement can meet the preliminary showing required by Franks. By granting certiorari in the instant case, this court will have the opportunity to clarify its ruling in Franks and eliminate this confusion.

But, this is more than a simple matter of clarifying a source of confusion. The integrity of our entire system of checks and balances is at stake. Search warrants are utilized every day by hundreds of law enforcement agencies across the land. The great

majority of them are issued based upon truthful affidavits which establish probable cause. But, some officers do lie to, or withhold material information from, the magistrate. Warrants obtained in this manner are a fraud on the court; officers who submit such perjurious affidavits make members of the judiciary their unwitting accomplices to their perfidy.

If the decision of the California Court of Appeal is allowed to stand, unscrupulous law enforcement officers will be able to draft affidavits from whole cloth which will be impervious to challenge. The simple incantation of a one-on-one personal observation of a criminal offense will always suffice to deny a defendant a Franks hearing unless, as Justice Wallin stated: "A defendant was fortunate enough to have

Mother Theresa at his side on the day in question." The concept that an affidavit of a police officer raises such a strong presumption of veracity that it can never be overcome by a contrary, uncorroborated affidavit of a defendant raises a frightening specter. Such a state of proof cries out for a judicial determination of credibility, not an arbitrary rule that denies a fair hearing.

Such concerns well justified the Court's decision to permit veracity challenges in the first place:

> The requirement that a warrant not issue 'but upon probable cause, supported by Oath or affirmation,' would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile. Franks, 438 U.S. at 168.

In Franks, there was also considerable conflict among both state and federal courts on the question whether veracity challenges to search warrant affidavits were constitutionally required and, if so, under what circumstances. The Court granted certiorari because of "the importance of the question, and because of the conflict among both state and federal courts. . . ." Franks, 438 U.S. at 161. It is submitted that the question presented herein is equally important because the constitutional right recognized in Franks will be rendered illusory if impossible preconditions to its benefits are imposed.

* * *

If certiorari is granted, Petitioners will argue to this court that it should clarify its holding in Franks to mani-

fest that "corroboration"[21] of a defendant's version of the facts is not required in order to gain a Franks hearing.

Wherefore, Petitioners respectfully request this Honorable Court grant certiorari.

DATED: November 15, 1991

Respectfully submitted,

By _____

JEFFREY WILENS
Attorney at Law
6 Hutton Centre Dr
11th Floor
Santa Ana, CA 92707

Attorney for
Petitioners

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[21]This would apply both to "corroboration" in the sense of presenting affidavits or testimony from disinterest persons, as well as to "corroboration" in the sense of showing that it is scientifically or physically impossible for the affiant's factual assertions to have been truthful.

NO. ____-_____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

KENT SANDLIN, Petitioner, BARBARA TUSTISON, Petitioner, v. PEOPLE OF THE STATE OF CALIFORNIA, Respondent.	)

PETITION FOR WRIT OF CERTIORARI TO THE

CALIFORNIA STATE COURT OF APPEAL

FOURTH APPELLATE DISTRICT, DIVISION THREE

APPENDICES TO PETITION

JEFFREY WILENS, Attorney at Law
6 Hutton Centre Drive, 11th Floor
Santa Ana, California 92707
(714) 434-5667

APPENDIX A

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

DIVISION THREE

(Filed May 31, 1991)

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. KENT SANDLIN AND BARBARA TUSTISON, Defendants/Appellants	G009302 (Super Ct. No. 72623) O P I N I O N

APPEAL from a judgment of the Superior Court of Orange County, Ronald E. Owen and Myron S. Brown, Judges. Affirmed.

Barry T. Simons, Tedd A. Mehr and Gordon S. Brownell, under appointment by the Court of Appeal, for Defendants and Appellants.

Daniel E. Lungren and John K. Van de Kamp, Attorneys General, Richard B. Iglehart, Chief Assistant Attorney

General, Harley D. Mayfield, Senior Assistant Attorney General, Louis R. Hanoian and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Kent Sandlin and Barbara Tustison pleaded no contest to several charges of cultivation and possession of marijuana for sale following their denial of their motions to suppress evidence seized pursuant to a search warrant. (Pen.Code, Section 1538.5.) Sandlin contends there was no probable cause for issuance of the search warrant. Both contend the trial court abused its discretion when it refused to hold a Franks v. Delaware (1978) 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 557 evidentiary hearing on the veracity of the affidavit in support of the search warrant. We affirm.

I

The facts are taken from the affidavit of Los Angeles County Sheriff Deputy Joseph Nunez. During the week of June 13, 1988, Nunez was told by a confidential informant that the informant was in a parking lot in Costa Mesa when he saw a woman, believed to be Tustison, engage in a drug sale. The woman arrived in a white Izuzu pickup truck and met with a man on a bicycle. The man called her "Barbara" several times. The woman removed a plastic bag containing a "green leafy substance" from the truck and gave it to the man in exchange for cash. He asked if it was "prime smoke." The informant was positive the substance was marijuana. The woman left and the man wrapped the bag in a beach towel and rode away.

Nunez determined the pickup truck was registered to Barbara Tustison at an address in Costa Mesa. Tustison's description matched that of the woman seen in the parking lot by the informant. Nunez went to the Costa Mesa address, a duplex, where he saw the pickup. Tustison came out of the residence with a towel tucked under her arm. Nunez followed her and, when he pulled up next to her, saw a bag "containing a green leafy substance resembling marijuana" laying on top of the towel on her lap. He returned to the Costa Mesa address after he lost Tustison in traffic. Tustison returned shortly carrying the same towel without the bag.

Nunez subsequently learned the other apartment in the duplex was occupied by Sandlin. While surveilling the two

apartments he saw Sandlin leave with a large object wrapped in cloth under his arm. Sandlin placed the object in a car and drove to the parking lot at Hoag Hospital in Newport Beach. He parked the car adn was approached by a man on foot carrying a brown paper bag. Sandlin got out of the car, pointed to the front seat and walked to the hospital entrance. The other man opened the car door and removed a plastic bag containing what Nunez believed was marijuana. He put the plastic bag in the paper bag, and went to the front of the hospital where he gave Sandlin cash. Sandlin counted the money and drove off.

Nunez requested and obtained a search warrant for both Costa Mesa apartments. A search revealed a marijuana farm in one and 20 pounds of dried marijuana in the other.

II

[This section is omitted in its entirety as it is not challenged in this Petition]

III

Sandlin and Tustison filed motions to suppress the evidence and traverse the search warrant. (Pen. Code, section 1538.5.) They contend that the trial court erred when it refused to hold an evidentiary hearing to test the veracity of the affidavit in support of the warrant. (Franks v. Delaware, supra, 438 U.S. 154.) They contend Nunez made material misstatements and omissions in his affidavit.

In Franks the United States Supreme Court held a defendant has a limited right under the Fourth Amendment to challenge the veracity of the affidavit underlying a facially valid search warrant. (Franks v. Delaware, supra,

438 U.S. 154; People v. Luttenberger (1990) 50 Cal.3d 1, 9.) To obtain a Franks postsearch evidentiary hearing on whether there has been official misconduct in drafting the affidavit, the defendant must make "a 'substantial preliminary showing that (1) the affiant has made statements which were deliberately false or in reckless disregard of the truth and (2) the affidavit's remaining content after [its] false statements are excised is insufficient to justify a finding of probable cause. [Citation.]'" (People v. Glance (1989) 209 Cal.App.3d 836, 846.) If the allegations are proven by a preponderance of the evidence at the hearing, the false material must be removed. If the remaining content is insufficient to establish probable cause, the evidence seized under the

warrant must be excluded. (Franks v. Delaware, supra, 438 U.S. at p. 157; People v. Luttenberger, supra, 50 Cal.3d at p. 10)

Nonetheless, there is a presumptio of validity with respect to the affidavit. To merit an evidentiary hearing the defendants' attack on the affidavit must be more than conclusory and must be supported by more than a mere desire to cross-examine. The challenge must contain allegations of deliberate falsehood or of reckless disregard for the truth. The motion for an evidentiary hearing must be "accompanied by an offer of proof. . .[and] should be accompanied by a statement of supporting reasons. Affidavits or otherwise reliable statements of witnesses should be furnished," or an explanation of their absence given. (Franks v.

Delaware, supra, 438 U.S. at p. 171.) The defendants must also demonstrate that the challenged material is necessary to a finding of probable cause. (Ibid.) The trial court's decision to not hold a Franks hearing is reviewed de novo on appeal. (United States v. Johns (9th Cir. 1988) 851 F.2d 1131, 1133.)

These requirements for a Franks hearing should not be confused with that which is required for a Rivas (People v. Rivas (1985) 170 Cal.App.3d 312) or Luttenberger (supra, 50 Cal.3d at p.21) discovery order. In Luttenberger, the defendant wanted informatio about a confidential informant relied upon in a search warrant affidavit in order to then attack the affidavit. Luttenberger distinguished between the necessary showing to obtain information

about an informant and the "substantial showing" necessary t obtain a Franks hearing. To obtain an order for such information, the defendant must merely show "the presumptively valid warrant affidavit is questionable in some way" (ibid.) which is "less demanding than the 'substantial showing of material falsity' required by Franks." (Ibid.)

In their moving papers Sandlin and Tustison asserted the informant was an off-duty police officer who sought to keep his identity secret because he was engaged to an acquaintance of the defendants, the circumstances under which the informant came to be at the Costa Mesa parking lot were inherently unbelievable, and the informant's description of how Tustison entered and left the Costa Mesa parking lot were physically impossible. For this reason

they urged all of the statements relating to the observations of the informant should be excluded.

Sandlin's and Tustison's showing with respect to the informant's information was not sufficient because the showing required to obtain a Franks hearing also requires a demonstration that the affidavit, when supplemented by the omissions, would not support a finding of probable cause. (United States v. Stanert (9th Cir. 1985) 762 F.2d 775, 782.) Sandlin's and Tustison's challenge with respect to the omission of the identity of the informant is little more than an objection to relying on the informant who is an off-duty police officer. There is absolutely no authority for their assertion that a police officer cannot be an informant, or that an affidavit based on

information from an informant who is a police officer is inherently suspect. Additionally, were the affidavit revised to substitute the true identity of the informant, there has been no showing as to how that would remove probable cause from the affidavit revised to substitute the true identity of the informant, there has been no showing as to how that would remove probable cause from the affidavit. As counsel for the defense stated below, had the affidavit revealed the informant was an off-duty police officer "they would have had more probable cause."

The defendants also challenge the veracity of the informant. To succeed, their offer of proof must challenge the truthfulness of the affiant, not that of the informant. (United States v. Kiser (9th Cir. 1983) 716 F.2d 1268, 1271.)

There was not a sufficient offer of proof to require a hearing with respect to the informant's statements.

Sandlin and Tustison also contend that the affidavit contains false statements regarding Nunez' independent observations. Both Sandlin and Tustison denied that they engaged in the activities which Nunez reported. In support, Tustison submitted her declaration stating she had never driven her truck while carrying marijuana in her lap on the date claimed by Nunez.[2] Actually, that is all she said in her declaration. We quote her declaration in its entirety: "I, Barbara Tustison, do declare, 1. I am the Defendant in the above-entitled actino. 2. At no

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[2]Her moving papers also stated her pickup was not registered at the Costa Mesa address contained in the affidavit, but no proof of this was offered.

time on the date of June 8, 1988, was I present in the parking lot (front or rear portions) of a Shopping Center complex at 488 E. 17th Street in the City of Costa Mesa, County of Orange. 3. At no time during the month of June 1988, or any other time, did I drive an Isuzu Pickup Truck Westbound [sic] on Broadway Street in Costa Mesa, with a large zip lock baggie containing a green leafy substance on top of a towel between my legs."

Likewise, Sandlin submitted his declaration stating that during the week he was allegedly observed making the marijuana sale in the parking lot of Hoag Hospital, his father was a patient in the hospital. He was there to visit but never engaged in a marijuana sale. We also reiterate his declaration in full: "I, Kent Sandlin, do declare: 1.

I am a Defendant in the above-entitled action. 2. During the week encompassing June 17, 1988, my father was a patient at Hoag Hospital in Newport Beach, County of Orange. During this period I had the occasion to vist that Hospital to see my father. However, at not [sic] time during that period, or any other time, did I deliver, sell, cause to be delivered, or sell, any substance resembling marijuana to any known or unknown individual."

The Franks requirement of a "substantial showing" means an offer of proof which must include affidavits or statements of reliable witnesses, or explanations for their absence. But the only proof submitted here was the defendants' conclusary and uncorroborated statements that they did not do what the affidavit alleged.

These are little more than self-serving general denials and fall far short of the substantial showing requirement of Franks.

Mere conclusary contradictions of the affiant's statements are insufficient for the "substantial preliminary showing" Franks requires. (E.g., People v. Glance, supra, 209 Cal.App.3d at p. 847.) In People v. Duval (1990) 221 Cal.App.3d 1105, the defendant actually testified under oath, denying any person was present at the time of the alleged narcotics transaction as declared in the affidavit for the search warrant. He also generally denied the allegations assertedly made by the informant in the affidavit. This testimony was presented without rebuttal yet the "showing" was considered insubstantial and the

defendant was denied a Franks hearing due to the insufficiency.

In United States v. Johns, supra, 851 F.2d 1131, the court concluded that the defendants' allegations that they never engaged in the drug manufacturing activies alleged in the affidavit merited an evidentiary hearing. But, in Johns the defendants bolstered their contentions with the affidavits of two experts who stated the allegations of the affidavit were necessarily false because they were scientifically impossible. '(Id. at p. 1134.) No such supporting proof was submitted with the defendants' motions. We do not hold that in every case the declaration or testimony of a defendant alone is insufficient to meet the showing required by Franks. But here there was no substantial showing that the

affidavit contained false statements and teh defendants were not entitled to an evidentiary hearing.

The judgment is affirmed.

Sills, P.J.

I concur:

Moore, J.

Wallin, J. Dissenting.

I would reverse and remand for a Franks (Franks v. Delaware (1978) 438 U.S. 154) hearing on the veracity of Nunez statements regarding his independent observations of Sandlin and Tustison. The "substantial showing" required by Franks requires only an offer of proof to directly controvert the affiant's statements. That offer must include affidavits or statements of reliable witnesses, or explanations for their absence. Here the two defendants submitted declarations, signed under

penalty of perjury, directly controverting the affidavit. The declarations carried with them the clear implication that the allegedly false statements were made "knowingly and intentionally, or with reckless disregard for the truth.'" (People v. Luttenberger (1990) 50 Cal.3d 1, 9.)

In United States v. Johns (9th Cir. 1988) 851 F.2d 1131, the defendants' allegations that they did not do what was alleged in the affidavit merited an evidentiary hearing when those allegations were supplemented with affidavits of experts. (Id. at p. 1134.) Here the only conceivable supporting proof for Sandlin or Tustison would have been a declaration from either an alibi or other percipient witness. I do not believe this kind of proof is reqiured to obtain a

Franks hearing. If either had been fortunate enough to have Mother Theresa by their side on the day in question and she too submitted a declaration stating the defendants did not engage in the alleged activities, without a doubt the trial court would have granted a Franks hearing. But the majority holds that in this case it is not enough that only the defendants submit declarations. In other words, it is presupposed that a criminal defendant, by virtue of having been accused, is unworthy of belief.

People v. Duval (1990) 221 Cal.App.3d 1105 rejected the defendant's claim that he had made a Franks "substantial showing." In Duval the police officer's affidavit in support of the search warrant alleged he had received information from a confidential informant regarding the defendant's

participation in the selling of cocaine, and another officer told him he obtained similar information from a citizen informant. The affiant conducted surveillance at the defendant's apartment and observed suspicious activities. After the defendant's arrest, the affiant police officer died. The defendant then requested a Franks hearing to challenge the affidavit. His offer of proof was his testimony that the facts stated by the affiant were untrue and that no such informant existed. The court affirmed the denial of his motion, concluding the defendant had provided only a general denial of the affiant's allegations and that the offer of proof was nothing more than the creation of an inference that the affiant lied. (Id. at p. 1113.) The court went on to state, "[W]e do not

hold that the sole testimony of a defendant would, in every case, be insufficient to meet the preliminary showing required by Franks. Each case necessarily must be determined on its own facts and circumstances." (Ibid.) In Duval, because the affiant was dead the only proof would have been the defendant's testimony that the acts alleged in the affidavit never occurred. Here the court could have held the Franks hearing and weighed the credibility of the defendants and the affiant. Furthermore, in Duval, the sole defedant was challenging the observations of an informant, not the affiant. (See United States v. Kiser, supra, 716 F.2d at p. 1271.) Here the two defendants each directly challenged the observations of the affiant. This was an adequate offer of proof entitling

them to an evidentiary hearing. The concern that allowing a Franks hearing on the basis of such an offer of proof has the practical effect of allowing two trials in every search warrant case is not well founded. The only purpose of the Franks hearing is to test the veracity of the affidavit. Once the court has concluded it contains sufficient probable cause, it is no longer an issue at trial. I would remand this case to the trial court for the limited evidentiary hearing required under Franks.

Wallin, J.

APPENDIX B

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

DIVISION THREE

(Filed June 24, 1991)

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. KENT SANDLIN AND BARBARA TUSTISON, Defendants/Appellants	)	G009302 (Super Ct. No. 72623) O R D E R

THE COURT:

The petition for rehearing is DENIED.

Sills, P.J.

I concur:

H. Moore, J.

I dissent. I would grant a rehearing.

Wallin, J.

APPENDIX C

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA
(Filed August 22, 1991)

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent,	)	Crim. SO21883
	)	CA G009302
v.	)	(Super Ct. No. 72623)
KENT SANDLIN AND BARBARA TUSTISON, Defendants/Appellants	)	

THE COURT:

Appellants' petition for review is DENIED.

Lucas, C.J.

Mosk, J., Broussard, J., Kennard, J. are of the opinion the petition should be granted.